STATE OF MICHIGAN

COURT OF APPEALS

JOY MERSMAN f/k/a JOY LINGENFELTER, Plaintiff-Appellant,	UNPUBLISHED May 24, 2012
v	No. 305383 Oakland Circuit Court
EDWARD JOHN LINGENFELTER, Defendant-Appellee.	LC No. 2005-714401-DM

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff, Joy Mersman, appeals an order that denied her request for sole legal and physical custody of minor child, BL, granted defendant, Edward Lingenfelter's motion for review of parenting time, and denied plaintiff's request for attorney fees. For the reasons set forth below, we reverse and remand for further proceedings.

I. FACTS AND PROCEEDINGS

Plaintiff and defendant married in 1987 and had three children, one of whom, BL, who is currently a minor.[1] The couple divorced on June 5, 2006. The divorce judgment granted the parties joint legal and physical custody of the children, with primary physical residence with plaintiff, and awarded defendant parenting time three out of every five weekends, one weekday evening a week, half of school breaks, four nonconsecutive weeks in the summer, and alternating holidays. On May 22, 2009, Judge Linda Hallmark issued an order modifying parenting time, providing that the older boys would alternate living with plaintiff and defendant on a weekly basis, but that BL's parenting time would remain the same.

Defendant is an unemployed electrician who has lived in Royal Oak with his mother since he and plaintiff divorced. Defendant is also a compulsive exhibitionist. Before his divorce, defendant was convicted of fleeing and eluding and indecent exposure several times, and when he was convicted of indecent exposure for the third time in January 2000, he was also

[1] Because the custody and parenting time issues only concern BL as the only remaining minor, we focus on the record as it relates to him.

convicted of sexual delinquency.[2] On that occasion, defendant spent five months in jail, during which time BL was born.

The record indicates that authorities have caught defendant exposing himself seven times, but defendant's therapist opined that, at his worst, defendant probably engaged in this behavior daily. The record reflects that defendant would disappear for several hours at a time in order to seek out victims to whom he could expose himself and masturbate. Defendant also had contact with prostitutes. According to defendant, he would lie to plaintiff during their marriage about where he went and what he did. Defendant is a registered as a sex offender and may not be in the company of unrelated minors. At the time of the custody hearing, defendant was in therapy for his sexual addiction, but he had also, apparently unsuccessfully, participated in therapy 10 times before. Defendant's current therapist testified that, based on defendant's participation in therapy, defendant may have a lower risk of reoffense but, statistically, he has a high risk of reoffense and exhibitionism has one of the highest rates of recidivism for any sexual crime. However, defendant's therapist did not think that defendant would ever engage in sexual activity with a minor.

Defendant was arrested again in March 2010 and convicted of aggravated indecent exposure. At that time, defendant's two older sons were staying with him. Following defendant's 2010 arrest, plaintiff moved for sole custody of the children, apparently with the belief that defendant would be imprisoned for his habitual criminal behavior. Instead, the criminal court sentenced defendant to five years of probation. The custody case was referred to a friend of the court referee to hear testimony with regard to whether there was a change of circumstances or good cause to revisit the issue of custody. On June 25, 2010, referee Patrick Cronin filed a recommendation with the court in which he opined that, because of defendant's ongoing aberrant sexual behavior, plaintiff should be awarded sole custody of the minor children, that the middle child should return to plaintiff's home, and that defendant should have parenting time at least once a month. Cronin opined that a custody review was warranted, that there was clear and convincing evidence that awarding plaintiff sole custody was in the best interests of the children, and that defendant's parenting time should be supervised. On July 15, 2010, defendant filed a motion objecting to the referee's recommendation and asked the court to leave intact the existing orders for custody and parenting time.

On August 4, 2010, Judge Lisa Gorcyca heard oral argument and agreed with the referee's conclusions. Judge Gorcyca ordered that, on the basis of defendant's conviction, the court would hold an evidentiary hearing on the issues of custody and parenting time. Judge Gorcyca also entered an interim order in which she changed defendant's parenting time with BL to supervised time twice a week at Impact Services. When Judge Gorcyca took a leave of absence, another judge took over the case and conducted the evidentiary hearing in May 2011.

---

[2] Some of defendant's criminal records are attached to defendant's brief on appeal, but the only information about his prior crimes available in the lower court record comes from testimony and the referee's findings of fact attached to his July 23, 2010, proposed order, none of which specifies precise dates or statutory sections for defendant's convictions.

On June 8, 2011, Judge Gorcyca's successor issued an opinion and order that rejected the friend of the court recommendation and denied plaintiff's motion for change of custody. Specifically, the court ruled that, because defendant did not receive a sentence of imprisonment for his March 2010 conviction for aggravated indecent exposure, there was no showing of good cause or change in circumstances to warrant a reevaluation of custody. The court further ruled that defendant should have unsupervised parenting time with BL, including a resumption of the holiday schedule set forth in the judgment of divorce. Thereafter, the trial judge stayed its order pending the outcome of this appeal, and ruled that the parties should continue to follow Judge Gorcyca's order of August 4, 2010.

II. DISCUSSION

This Court will affirm a custody order "unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), citing MCL 722.28.

Plaintiff argues that the trial court erred in ruling that plaintiff did not establish proper cause or changed circumstances to revisit the custody arrangement. As an initial matter, we observe that, without explanation, the trial court ruled directly contrary to Judge Gorcyca, who already concluded, based on evidence adduced at the friend of the court hearing, that proper cause or changed circumstances existed to revisit the issue of custody. This is precisely why Judge Gorcyca ordered an evidentiary hearing on the issue of custody. A party seeking to change a custody order must first establish proper cause or a change in circumstances. MCL 722.27(1)(c); *Parent v Parent*, 282 Mich App 152, 155; 762 NW2d 553 (2009). "If a party fails to do so, the trial court may not hold a child custody hearing." *Corporan v Henton*, 282 Mich App 599, 603-604; 766 NW2d 903 (2009). Again, the court ordered a custody hearing because, on August 4, 2010, Judge Gorcyca ruled that plaintiff met her evidentiary burden.

While it is true that, pursuant to MCR 2.613(B), a judge may correct error by vacating or setting aside an order of a judge who is absent or unable to act, there was no error in Judge Gorcyca's determination that, based on defendant's most recent conviction for aggravated indecent exposure, there was good cause or changed circumstances to reconsider the custody arrangement. Indeed, we decline to hold that defendant's additional conviction has no impact on his custodial rights merely because he failed to serve prison time and was also convicted several times before for similar deviant sexual conduct. To so hold would be tantamount to ignoring or even permitting a parent to engage in criminal conduct, without any effect on the custody of minor children, so long as the parent engaged in such conduct in the past.

Because, on the basis of good cause or changed circumstances, Judge Gorcyca correctly ordered a custody hearing, it was then incumbent upon the court to determine the applicable burden of proof at the hearing. *Dailey v Kloenhamer*, 291 Mich App 660, 666-667; ___ NW2d ___ (2011), citing MCL 722.27(1)(c). "[T]he circuit court's 'threshold determination . . . is whether an established custodial environment exists.'" *Pierron v Pierron*, 282 Mich App 222, 244 765 NW2d 345 (2009), quoting *LaFleche v Ybarra*, 242 Mich App 692, 695-696; 619 NW2d 738 (2000). The trial court specifically ruled that BL's established custodial environment is with plaintiff. We agree. The record reflects that, over a significant length of time, BL looked

to plaintiff "for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c).

If a change in custody would not result in a change to the established custodial environment, the burden is on the party seeking the change to establish, not by clear and convincing evidence, but by the less requiring standard—a preponderance of evidence—that the change would be in the child's best interests. *Pierron*, 282 Mich App at 245. "In making a custody determination, a trial court is required to evaluate the best interests of the children under the twelve statutorily enumerated factors." *Kessler v Kessler*, 295 Mich App 54, 63; ___ NW2d ___ (2011). Those factors are set forth in MCL 722.23. When making a ruling on a change in custody "the circuit court must expressly evaluate each best-interest factor and state its reasons for granting or denying the custody request on the record." *Dailey*, 291 Mich App at 667, citing MCL 722.26a and *Meyer v Meyer*, 153 Mich App 419, 426; 395 NW2d 65 (1986).

The circuit court did not consider whether plaintiff proved by a preponderance of evidence that it would be in BL's best interests for her to have sole custody of him, and did not consider the best interests factors in MCL 722.23. Accordingly, we reverse the trial court's decision and remand for a custody hearing.

On the basis of the record at the custody hearing, the court awarded defendant unsupervised time with BL based on the parenting time factors set forth in MCL 722.27a(6). In so holding, the trial court, in essence, vacated Judge Gorcyca's interim order providing for supervised parenting time with defendant and returned the parties to the consensual arrangement that existed prior to plaintiff's motion for change of custody. In so holding, the court appeared to conclude that there was a change in circumstances to warrant a change in parenting time, but that this change actually favored defendant. Again, this is contrary to Judge Gorcyca's finding of a change in circumstances based on defendant's additional conviction for deviant sexual behavior which triggered her interim order. It was that change in circumstances that led her to require supervised visitation with BL, which is clearly an order justified by MCL 722.27(1)(e), which permits a court to take any action necessary for the best interests of the child.

> Where the parties consent to a visitation provision in a judgment of divorce, the provision may be modified where there is a change of circumstances or new facts arising since the original decree was entered which warrant the modification. *Sims v Sims*, 298 Mich 491, 496-497; 299 NW 158 (1941). When determining visitation rights, as with child custody matters, the best interests of the children involved are of paramount importance. [*DenHeeten v DenHeeten*, 163 Mich App 85, 89; 413 NW2d 739, 741 (1987).]

As with the issue of custody, in considering parenting time under these circumstances, the court should consider the best interest factors, not simply the parenting time factors set forth in 722.27a(6). *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). On remand, the trial court should conduct a new child custody hearing and review parenting time in light of the proper burdens of proof and legal standards, as set forth in this opinion.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Henry William Saad